

This is the second appeal in this case. The Board issued a decision on December 15, 2006 affirming the Office's termination of appellant's compensation effective November 14,

2005 for refusing an offer of suitable work.¹ The Board found that the Office properly relied upon the opinion of Dr. Joe W. Crow, a Board-certified orthopedic surgeon, who served as an impartial medical specialist, in determining that the modified rural carrier associate position offered by the employing establishment in September 2005 was suitable.² In a report dated August 15, 2005, Dr. Crow acknowledged that appellant continued to have residuals of her employment injuries but indicated that he had reviewed the job offered by the employing establishment³ and determined that she was medically capable of performing this modified-duty position.⁴ The Board noted that Dr. Crow detailed appellant's use of medications and diagnosed narcotic habituation, but found that he provided no indication that her use of medications prevented her from working as a modified rural mail carrier associate.⁵ The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

After the Board's December 15, 2006 decision, appellant submitted additional medical evidence. She argued that the modified rural carrier associate position offered by the employing establishment was not suitable and that she was justified in refusing it in late 2005.

Appellant submitted a December 6, 2006 report of Dr. John W. Ellis, an attending physician Board-certified in family practice and environmental medicine. Dr. Ellis provided a discussion of appellant's medical treatment for her back problems since the late 1990s. He indicated that on examination appellant complained of pain, stiffness and tightness in her back with pain radiating into both lower extremities. Appellant reported that no position was comfortable for any length of time. Dr. Ellis found that she had limited back motion and weakness in her lower extremities. He diagnosed various conditions related to her work for the employing establishment, including muscle tendon unit strain of the lumbosacral spine, lumbar disc herniation/derangement at L4-5 (status post multiple surgeries), arachnoiditis, failed back

¹ Docket No. 06-1027 (issued December 15, 2006). On September 12, 1997 appellant, then a 32-year-old part-time rural carrier associate, filed an occupational disease claim alleging that she sustained injury to her back by carrying mail at work. She stopped work on August 30, 1997. The Office accepted that appellant sustained a lumbar sprain and lumbar herniated nucleus pulposus. On December 17, 1997 appellant underwent a laminectomy and discectomy at L4-5 and on September 13, 1998 she underwent a repeat laminectomy at L4-5.

² The offered position, which was for 25 hours per week, required sitting, intermittent walking and simple grasping for up to four hours per day and pushing a light-weight roll-around cart which could be pushed with one finger, for up to 30 minutes per day. Appellant refused the offered position in October 2005.

³ Dr. Crow reviewed a description of a job that the employing establishment offered in May 2005 but this job had the same work duties as the modified rural carrier associate position offered in September 2005. The job offered in May 2005 involved working 17 hours per week. Both of the offered jobs had work hours which included nonwork periods of about three to six hours between morning and afternoon work periods.

⁴ In an accompanying form, Dr. Crow stated that appellant could lift up to 10 pounds for two hours per day, push up to 20 pounds for two hours per day, pull up to 20 pounds for two hours per day and operate a motor vehicle at work for two hours per day. He indicated that appellant should spend less than an hour performing several activities, including twisting, bending, stooping, squatting and kneeling and that she should not engage in climbing. Dr. Crow stated that appellant could perform modified-duty work for eight hours per day.

⁵ The Board also found that the other medical evidence of record did not support a finding that appellant's use of medications prevented her from performing the offered position.

syndrome/post laminectomy syndrome (status post spinal cord stimulator placement and removal), bilateral lower extremity radiculopathy/sciatica and chronic pain syndrome. Dr. Ellis stated:

“I have received and reviewed an offer of modified assignment (limited duty) of May 19, 2005. In my opinion, [appellant] cannot perform those duties nor can she work a ‘split shift.’ [Appellant] continues to require medication with side effects such as drowsiness, dizziness and problems focusing and concentrating, *etc.*”

Appellant submitted a March 12, 2007 report in which Dr. Brian T. Nichol, an attending Board-certified anesthesiologist, discussed her back condition and recommended treatment with a spinal cord stimulator. She also submitted the findings of an April 30, 2007 magnetic resonance imaging scan of her back and several brief treatment notes of Dr. Nichol from April and May 2007.⁶

In a June 5, 2007 decision, the Office denied modification of its prior decision.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees’ Compensation Act provides in pertinent part, “A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation.”⁷ However, to justify such termination, the Office must show that the work offered was suitable.⁸ An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.⁹

Section 8123(a) of the Act provides in pertinent part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”¹⁰ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹¹

⁶ Appellant submitted additional evidence after the Office’s June 5, 2007 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

⁷ 5 U.S.C. § 8106(c)(2).

⁸ *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

⁹ 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

¹⁰ 5 U.S.C. § 8123(a).

¹¹ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

ANALYSIS

The Office accepted that appellant sustained a lumbar sprain and lumbar herniated nucleus pulposus due to the performance of her work duties and authorized two surgeries at L4-5 which were performed in December 1997 and September 1998. It terminated appellant's compensation effective November 14, 2005 on the grounds that she refused an offer of suitable work. The Office based its determination regarding the suitability of the modified rural carrier associate position offered by the employing establishment in September 2005 on an August 15, 2005 report of Dr. Crow, a Board-certified orthopedic surgeon, who served as an impartial medical specialist. In a December 15, 2006 decision, the Board affirmed the Office's termination of appellant's compensation effective November 14, 2005 for refusing an offer of suitable work.

Because the Office met its burden of proof to terminate appellant's compensation effective November 14, 2005 for refusing an offer of suitable work, it is appellant's burden to show that such refusal to work was justified.¹² The Board finds that appellant did not meet her burden of proof to establish that her refusal of the modified rural carrier associate position offered by the employing establishment was justified. Therefore, the Office's termination of her compensation effective November 14, 2005 was proper.

Appellant submitted a December 6, 2006 report of Dr. Ellis, an attending physician Board-certified in family practice and environmental medicine, who diagnosed various conditions including muscle tendon unit strain of the lumbosacral spine, lumbar disc herniation/derangement at L4-5 (status post multiple surgeries), arachnoiditis, failed back syndrome/post laminectomy syndrome (status post spinal cord stimulator placement and removal), bilateral lower extremity radiculopathy/sciatica and chronic pain syndrome. Dr. Ellis noted that he had reviewed a May 19, 2005 offer of modified-duty work¹³ and stated, "In my opinion, [appellant] cannot perform those duties nor can she work a 'split shift.' [Appellant] continues to require medication with side effects such as drowsiness, dizziness and problems focusing and concentrating, etc."

The Board finds that Dr. Ellis' opinion is of limited probative value on the relevant issue of the present case in that he did not provide a clear opinion that appellant could not perform the modified rural carrier associate position around the time that it was offered by the employing establishment in September 2005. Dr. Ellis described appellant's medical condition in December 2006, *i.e.*, a period more than a year after she refused the offered position in October 2005. Even if [his] opinion could be interpreted as an opinion that appellant could not perform the offered position in late 2005, Dr. Ellis did not provide sufficient medical rationale to support this conclusion.¹⁴ He did not explain how appellant's medical condition in late 2005

¹² See *supra* note 9 and accompanying text.

¹³ Appellant actually refused the modified rural carrier associate position offered by the employing establishment in September 2005. The two jobs offered in May and September 2005 had the same work duties. The job offered in May 2005 required working 17 hours per week whereas the job offered in September 2005 required working 25 hours per week.

¹⁴ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

prevented her from performing the extremely limited duties required by the modified rural carrier associate position. Dr. Ellis indicated that appellant had problems with medications but he did not provide any detailed discussion of these problems or explain how they would have prevented her from performing the offered position in late 2005.¹⁵

Given the limited probative value of Dr. Ellis' report on the relevant issue of the present case, the weight of the medical evidence regarding the suitability of the modified rural carrier associate position would continue to rest with the well-rationalized opinion of the impartial medical specialist, Dr. Crow.¹⁶ For these reasons, appellant did not show that her refusal of the modified rural carrier associate position offered by the employing establishment was justified.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective November 14, 2005 on the grounds that she refused an offer of suitable work.

¹⁵ In its December 15, 2006 decision, the Board noted that Dr. Crow detailed appellant's use of medications and diagnosed narcotic habituation, but found that he provided no indication that her use of medications prevented her from working as a modified rural mail carrier associate, nor did Dr. Ellis explain how appellant's medical condition prevented her from working a "split shift." The job offered by the employing establishment had work hours which included nonwork periods of about three to six hours between morning and afternoon work periods.

¹⁶ See *supra* notes 10 and 11 and accompanying text. Appellant also submitted reports dated between March and May 2007 of Dr. Nichol, an attending Board-certified anesthesiologist, and the findings of April 30, 2007 magnetic resonance imaging of her back. However, none of these reports contained any opinion on appellant's ability to work in late 2005.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 5, 2007 merit decision is affirmed.

Issued: March 10, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board